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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 346

WILLIAM M. TADIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 15-19) is reported at 223 F. 2d 759.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1955 (Pet. 15), and the petition for rehearing was denied on July 26, 1955. The petition for a writ of certiorari was filed August 25, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed prejudicial error when, after first refusing to allow an accountant to testify as to advice given by him to petitioner, it later allowed the testimony.

2. Whether the final words of the court in its charge to the jury, made at petitioner's specific request, pointing out that petitioner was not wilfully evading a tax if he in good faith acted contrary to Treasury Regulations, were sufficient to cure a previous erroneous charge with respect to petitioner's right to report income at the completion of a long-term contract.

3. Whether the trial court committed plain error in instructing the jury on the elements of the crime of wilfully making and subscribing false income tax returns.

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in

addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

SEC. 3809 [as amended by Sec. 4(a), Act of August 27, 1949, c. 517, 63 Stat. 666]. VERIFICATION OF RETURNS; PENALTIES OF PERJURY.

(a) *Penalties.* Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3809.)

Federal Rules of Criminal Procedure:

Rule 30. *Instructions.* * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he ob-

jects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On January 29, 1954, a two-count indictment was filed against petitioner in the United States District Court for the Western District of New York charging him with wilful attempts to evade income taxes in violation of Section 145(b) of the Internal Revenue Code of 1939. The two counts charged him with filing fraudulent income tax returns for himself and his wife for the years 1950 and 1951. The amounts of adjusted gross income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 1, 132, 133, 134):

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1950).....	$2,899.92	$139.00	$ 9,792.38	$1,299.24
Count II (1951).....	3,199.92	216.00	14,769.73	2,864.82

On March 2, 1954, a second two-count indictment (R. 4, 135, 136) was filed against petitioner in the United States District Court for the Western District of New York charging him with wilfully filing a return for each of the years 1950 and 1951 which he did not believe to be true and correct, in violation of Section 3809(a) of the Internal Revenue Code of 1939.

After a jury trial on the consolidated indictments, petitioner was found guilty as charged (R. 150) and on June 15, 1954, he was sentenced to concurrent terms of imprisonment for one year and

one day on all four counts and fined $2,000 on count one of the first indictment (R. 152-153). The Court of Appeals unanimously affirmed the conviction. (Pet. 15-19.)

Since the sufficiency of the evidence to support the verdict is not questioned in the petition, it is enough to note here that the court below summarized the evidence (Pet. 17) as showing that the petitioner, the plumbing and building inspector of Cheektowoga, New York, reported his salary on his 1950 and 1951 income tax returns as his only income, whereas he had actually been engaged in the plumbing business during that period; that his plumbing jobs were mostly small before the summer of 1950, at which time he and his brother-in-law contracted to install plumbing for the B. G. King Building Corporation in 122 houses at the price of $630 per house; that he admitted on the stand that he must have been making a profit on the small jobs; and that he told a revenue agent that he had not reported the income from the big contract because he had failed to report business income in the past and feared it would invite an investigation if he began to do so. Petitioner's chief defense was that he had been advised by an accountant that he need not report the income from the King contract until it had been completed in 1953. (R. 55, 58-63, 72-73.)

ARGUMENT

1. Petitioner took the stand at the trial and testified that he had relied on the advice of an accountant, Langhams, in not reporting his profits from the

King contract in 1950 and 1951 (cf. R. 58), and Langhams thereafter testified that he had "suggested" such a course of action to petitioner[1] (R. 60-63). Defense attempts to have Langhams testify to this effect had twice previously been overruled by the trial judge (R. 46-59), and petitioner now contends (Pet. 5-6, 9-10) that his defense of lack of wilfulness was vitiated by these rulings.

There is no merit in this contention. As the opinion below points out (Pet. 17-18), the erroneous earlier exclusion of Langhams' testimony was completely cured when he was ultimately allowed to give the relevant details of his conversation with petitioner.[2] Cases which discuss the prejudicial nature of evidence excluded after having been previously admitted (Pet. 10) have no application here. There is obviously no parallel between

---

[1] It should be noted that while Langhams had been an accountant for many years (R. 54), his principal business was wholesale plumbing and heating (R. 46, 61). Furthermore, his suggestion appears to have been merely incidental to a discussion of the amount of credit to be extended by his firm to petitioner for materials furnished in connection with the King contract. (R. 60-66.)

[2] It is highly doubtful that the original exclusion of Langhams' testimony was erroneous. At that point, there was no evidence in the record to indicate that petitioner's returns were executed in reliance on Langhams' suggstion. The materiality and relevance of the testimony were, therefore, doubtful, and it would seem that the trial judge acted within the limits of sound discretion in excluding it at that time. Cf. *Haigler* v. *United States*, 172 F. 2d 986, 987 (C.A. 10th); *Miller* v. *United States*, 120 F. 2d 968, 970 (C.A. 10th). After petitioner had supplied the link by testifying as to his reliance, the relevance of Langhams' suggestion became clear and the trial judge, after some hesitation, ultimately admitted it. (R. 58-62.)

the effect of highly prejudicial evidence which should never have been heard by the jury, and the effect of favorable testimony which the defense, after being initially balked, eventually manages to get before the jury. The result in the latter case almost inevitably benefits the defendant by highlighting evidence which is helpful to him.

Nor is there merit in the additional contention (Pet. 9) that the trial court's initial exclusion of Langhams' testimony violated petitioner's constitutional privilege by forcing him to take the stand himself. As has been seen (*supra*, p. 6), the initial exclusion was probably correct. Moreover, petitioner did not complain at the trial that the ruling would deprive him of his constitutional right (R. 49-67), and the issue appears to have been raised for the first time in this Court. Under the circumstances, it is logical to assume that neither defense counsel nor the trial judge understood that petitioner's decision to take the stand rested upon the admission or exclusion of Langhams' testimony. *Barshop* v. *United States*, 192 F. 2d 699, 700 (C. A. 5th), certiorari denied, 342 U. S. 920.

Furthermore, the Government's evidence established that, in addition to the unreported income from the King contract, petitioner received almost $9,000 in 1950 and about $12,000 in 1951, a considerable portion of which represented unreported income from small plumbing jobs. (R. 125.) [3] This

[3] The reference is to the trial court's summary of the evidence in the charge to the jury. The testimony as to these figures is not included in the record before this Court, but there was no challenge to the accuracy of the trial court's summary.

evidence, unchallenged by petitioner, would alone have been sufficient to support the verdict.

2. Some passages of the trial court's original charge were susceptible of interpretation as permitting the jury to find that petitioner wilfully failed to report the current income from the King contract in 1950 and 1951, even though he believed in good faith that he was entitled to report all such income in 1953 upon completion of the contract. (R. 118, 120-121, 123, 125-126.) However, in response to objection by defense counsel, this misconception was cleared up, and it was made clear that good faith reliance upon Treasury Regulations would constitute a complete defense. (R. 128-132.) We think it sufficient to quote the trial court's final admonition to the jury, which the court below (Pet. 18-19) found adequate to dispel any misunderstanding (R. 131-132):[4]

> The Court: It charges here, "Wilfully means knowingly, and with a bad heart, and a bad intent". I think I will charge it. It means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. "It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent, or grossly negligent." Of course, that is not so. It has got to be shown, as I have stated time and time again, it must be wilful.

[4] The trial court was reading from the opinion in *Gaunt* v. *United States*, 184 F. 2d 284, 291 (C.A. 1st), certiorari denied, 340 U.S. 917. There is nothing in the record to justify the assertion (Pet. 8) that these final comments were not actually addressed to the jury.

> "He is not wilfully evading a tax if all that is shown is that he made errors of law." That is true. "He is not wilfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury." I so charge.

In view of this final specific instruction, to the effect that good faith failure to observe the Regulations does not constitute the wilfulness required by the statute, there is no merit in the contention (Pet. 6-8, 11-13) that the earlier misleading portion of the charge was not cured. "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach* v. *United States,* 326 U. S. 607, 612.

3. Although no pertinent objection was made at the conclusion of the instructions to the jury (R. 127-132), petitioner now complains (Pet. 8, 13-14) that that part of the charge which related the offense alleged in the second indictment, i. e., the making and signing of false returns, permitted the jury to convict him without finding a specific wrongful intent to violate the statute. Concededly some of the language used by the trial court in this respect was confusing. (R. 116.) On the other hand, the jury were clearly told that one of the elements of this offense was knowledge of the falsity of the return (R. 116) and that the question to be decided was "whether the defendant believed his return to be correct" (R. 122). No fur-

ther evidence of wilfulness is required under the language of Section 3809(a) (*supra*, p. 3), and the instruction was adequate in the absence of objection by the defense.

Furthermore, in view of the concurrent sentences imposed on all four counts under which petitioner was convicted, and in view of the lack of substance in petitioner's attack upon his conviction under the tax evasion counts, there is no necessity for a review of the question presented by this section of the petition. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641-642.

CONCLUSION

The decision below is clearly correct, and no conflict of decisions or important question of law is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
JOSEPH M. HOWARD.
ELDON F. HAWLEY,
Attorneys.

SEPTEMBER, 1955.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 346

WILLIAM M. TADIO,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

REPLY BRIEF OF PETITIONER

WILLIAM B. MAHONEY,
HYMAN KARNOFSKY,
ARNOLD WEISS,
all of
Buffalo, New York,
Attorneys for Petitioner.

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BATAVIA, N. Y.

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THE UNITED STATES OF AMERICA.

REPLY BRIEF

Statement

Petitioner respectfully submits this reply brief in answer to the brief of the United States in opposition to his petition for writs of certiorari herein.

The Government's Brief in Opposition apparently concedes most of the positions taken by the petitioner, but seeks to obviate the effect of the errors by claiming that:

(a) The errors were cured.

(b) The errors were not duly objected to.

(c) The errors were not prejudicial and may have been "helpful".

Further Rules Involved

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 30. Instructions

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Rule 52 (b) Plain Error.

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Reply—Argument

As to Question No. 1

The Government's Brief in Opposition makes the following unsupported claims in an attempt to minimize the prejudice to petitioner caused by the court's erroneous exclusion of the Accountant Langhans' testimony[1] as to deferred reporting advice to petitioner:

[1] In this connection a chronological timetable of this portion of the trial is significant:

(Footnote continued on following page.)

GOVERNMENT'S CLAIMS	PETITIONER'S REPLY
Error was cured by "ultimately" allowing the accountant Langhans to testify on his third appearance on the stand. (G. B. 5-6; f. n. 2)[2]	Court never withdrew its erroneous characterization of both petitioner's and Accountant Langhans' testimony as "improper", "hearsay" and not "competent" and "If an objection has (sic) been raised to the introduction of that proof, it wouldn't have been received. It was received without objection". (pp. 55-56; 58-59) Court in its charge, neither mentioned the accountant Langhans nor his testimony. (pp. 114-132)
Original exclusion of testimony was proper since no sufficient basis was laid until after petitioner himself took stand and supplied "the link". (G. B. 6, f. n. 2)	Jury, court and Government's counsel were apprised that petitioner's main defense was reliance on Accountant Langhans' advice to defer reporting income. (pp. 25-26; 27; 31-32; 55-57) In fact, Government's counsel stated, "* * * the Gov-

(Footnote continued from preceding page.)

May 7, 1954 A. M. (p. 35) Accountant Langhans' testimony excluded on first appearance. (pp. 46-57)

May 7, 1954, A. M. Petitioner's offer of proof re Accountant Langhans. (p. 55)

May 7, 1954, A. M. Counsel's futile inquiry to learn if Accountant's testimony will be admitted if petitioner takes stand. (p. 57)

May 7, 1954, P. M. (p. 58) Petitioner Tadio takes stand and testifies to Accountant's advice. (p. 58)

May 7, 1954, P. M. Accountant Langhans recalled and testimony excluded for the second time. (pp. 58-59)

May 7, 1954, P. M. Court adamantly and finally characterizes testimony of both petitioner Tadio and accountant Langhans as objectionable and not "competent". "Subject to being stricken out if objected to." (pp. 58 & 59)

May 10, 1954, A. M. (p. 59) Accountant Langhans called for third time and allowed to give meager testimony and sharply cross-examined by court. (pp. 60-67)

[2] References "G.B." are to pages of Government's Brief in Opposition.

GOVERNMENT'S CLAIMS	PETITIONER'S REPLY
	ernment is perfectly willing to call * * * Mr. Langhans as witnesses on this factual defense". (p. 32) Requiring petitioner to first take the stand and supply "the link" as advocated by the Government would violate petitioner's rights under Amended Article V of the Constitution of the United States.
Errors of repeated exclusion "almost inevitably benefits the defendant by highlighting evidence which is helpful to him". (G. B. 7)	*Res Ipsa Loquitur*
Accountant Langhans' advice to petitioner was a "suggestion * * * merely incidental to a discussion of the amount of credit to be extended". (G. B. 6; f. n. 1)	The Accountant Langhans also stated that it was more than "suggestion" and a credit discussion: "* * * if I may put it in my own words we are primarily interested in securing business and to secure a job of this nature we are very interested, and we had to know where our money was coming from, and the condition of certain organizations. On such as the B. G. King we try to give advice —" (pp. 65-66). Langhans testified that petitioner agreed that Langhans' advice was "the most logical way to handle this job". (p. 63)
Accountant Langhans' principal business was wholesale plumbing and heating	Langhans testified that he was an accountant since 1926 (p. 54) and that 5 years

GOVERNMENT'S CLAIMS	PETITIONER'S REPLY
and not accounting. (G. B. 6; f. n. 1)	prior to the trial, in 1949, just prior to the giving of this advice, he had gone into the plumbing business. (pp. 46, 54, 65)
"* * * neither defense counsel nor the trial judge understood that petitioner's decision to take the stand rested upon the admission or exclusion of Langhans' testimony." (G. B. 7)	See offer of proof (pp. 55-56) and futile attempt to obtain ruling from court as to whether petitioner's taking stand was a condition precedent to accountant's testimony. (p. 57)

As to Question No. 2

The Government apparently concedes that "passages of the trial court's original charge" were erroneous and subject to "misconception" (G. B. 8) and does not contest that the "alleged" cure, if any, at the termination of the charge, did not refer back to or withdraw any of the prior specific erroneous charges. The actual words of the Court of Appeals were "these were the court's final words to the jury and we think they *must* have wiped out any misconception * * *" (emphasis supplied) (pp. 18-19).

The Government does not dispute petitioner's claim that this final charge was not directed to, or heard by, the jury.[3] It merely states that "there is nothing in the record to justify the assertion * * *" (G. B. 8). There may well be a mistake in the transcript as to this final portion of the charge (pp. 131-132) since on the motion for a new trial, neither the Court nor the Government disputed that the court read to itself from the case of Gaunt v. U. S. (pp. 104; 113; 148; point 28).

[3] Eldon F. Hawley, on the Brief in Opposition herein, for the Government, was present at the trial. (pp. 27, 32).

As to Question No. 3

The Government's Brief states "concededly some of the language used by the trial court in this respect was confusing" but claims "no pertinent objection was made" (G. B. 9).

It was impossible for petitioner's counsel to follow the procedure of Rule 30 of the Rules of Criminal Procedure since the Court did not follow this Rule and handicapped petitioner's counsel by not passing on the written requests to charge prior to giving the charge (pp. 114, 127, 113). Nevertheless, the entire charge of the Court was replete with errors as to both the definition and necessity of intent and willfulness in connection with both indictments. Furthermore, under Rule 52 (b) of the Rules of Criminal Procedure and in the interests of justice, this Court may on its own motion take notice of such plain and gross errors which seriously affect substantial rights and unjustly prejudice petitioner. See U. S. v. Atkinson, 297 U. S. 157, 160, 80 L. Ed. 555, 557; Brasfield v. U. S., 272 U. S. 448, 450, 71 L. Ed. 345, 346; U. S. v. Raub, (C. A. 7) 177 F. (2d) 312, 315-316; U. S. v. Levi, (C. A. 7) 177 F. (2d) 827, 831-832.

Conclusion

Petitioner respectfully submits that for the reasons specified in the petition herein and in this reply brief, this Court should grant writs of certiorari herein.

Dated: Buffalo, New York, September 28th, 1955.

Respectfully submitted,

WILLIAM B. MAHONEY,
HYMAN KARNOFSKY,
ARNOLD WEISS,
Counsel for Petitioner.

In the Supreme Court of the United States

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No. 346

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In our brief in opposition (pp. 8-9) we pointed out that the trial judge read certain passages from the opinion in *Gaunt* v. *United States,* 184 F. 2d 284, 291 (C.A. 1st), certiorari denied, 340 U.S. 917, in order to make it clear that good faith reliance upon Treasury Regulations would constitute a complete defense, and we stated that there was nothing in the record to justify petitioner's assertion (Pet. 8) that those remarks were not actually addressed to the jury. Petitioner's reply brief (p. 5) asserts that the Government does not dispute his claim that this final charge was not directed to, or heard by, the jury, and notes the fact that Eldon F. Hawley,

whose name appears on the brief in opposition, was present at the trial for the Government.

Mr. Hawley, who was at that time a revenue agent, was present during some portions of the trial, but he has no recollection of having been in the courtroom at the time the jury was instructed. However, the Assistant United States Attorney who presented the Government's case assures us that the entire charge was heard by the jury. The Assistant was asked about this matter during oral argument in the Court of Appeals, and that court was obviously satisfied with his explanation.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
JOSEPH M. HOWARD,
ELDON F. HAWLEY,
Attorneys.

OCTOBER, 1955

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